UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Case No. 17-cr-364

-vs-

SKYLAR DAVIS, et al.

Defendants.

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United States Courthouse
White Plains, New York
February 8, 2019
10:36 a.m.

Before:

HONORABLE CATHY SEIBEL

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
ALLISON NICHOLS
MAURENE COMEY
SAMUEL RAYMOND
Assistant United States Attorneys

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A P P E A R A N C E S: (CONT.)

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DANIEL S. PARKER
Attorneys for the Defendant, Troy Young

LAW OFFICES OF JILL R. SHELLOW
JILL R. SHELLOW
Attorney for the Defendant, Skylar Davis

ALSO PRESENT:

FBI Special Agent Andrei Petrov

THE DEPUTY CLERK: The Honorable Cathy Seibel presiding, United States versus Davis.

THE COURT: Good morning. Everyone can have a seat. Let me first make sure I know who is where.

Good morning, Ms. Nichols, Ms. Comey, Mr. Raymond, Agent Petrov.

MS. NICHOLS: Good morning, Your Honor.

MS. COMEY: Good morning, Your Honor.

MR. RAYMOND: Good morning, Your Honor.

THE COURT: And Ms. Shellow and Mr. Davis, good morning.

MS. SHELLOW: Good morning, Your Honor.

THE DEFENDANT: Good morning.

THE COURT: And then Mr. Miedel and Mr. Dratel and Mr. Hawkins.

MR. MIEDEL: Good morning, Your Honor.

THE COURT: Good morning. And then Mr. -- I ask this every time -- Fennell?

THE DEFENDANT: Yes.

THE COURT: Fennell and Mr. Tulman, good morning.

That leaves Mr. Young, Mr. Bachrach and Mr. Parker.

MR. BACHRACH: Good morning, Your Honor.

THE COURT: Good morning to all of you.

The first thing I want to talk about is the schedule. I have a letter from Ms. Shellow from January 25th asking for an

adjournment for reasons she set forth in a separate sealed letter, which I will summarize as saying an obligation to another client. I endorse that saying I didn't think it was an unavoidable conflict, but I had an open mind, and I asked Ms. Shellow to let me know when there was another window where we could try the case.

I guess before I go further, I should ask the government: Do we still think this is three-plus weeks?

MS. NICHOLS: Yes. Three to four, Your Honor.

THE COURT: Okay. I then heard from Ms. Shellow, essentially, that if the case didn't go as scheduled, it could go in August or November. I can't do it in August.

I then asked my deputy to inquire whether anybody else was asking for an adjournment. Ms. Shellow responded -- and this was all by email, and this has all been shared with all parties -- I will summarize the state of play, and if this is not accurate, anybody can speak up and correct me.

Ms. Shellow wants an adjournment. Mr. Miedel can do it as scheduled, but has a family reason why he would like it if the date were adjourned. Mr. Dratel is going to be with me on one case or another, and the other lawyers are not asking for adjournment, not opposing it either.

Is that a fair summary?

MS. SHELLOW: Your Honor, I believe that is a fair summary.

MR. TULMAN: Yes, Your Honor. On behalf of myself and my co-counsel on the matter, Mr. Sosinsky, who is literally next door with Judge Briccetti when this was moved to 10:30, so he is not here, the November date would be the date that would work for us.

THE COURT: You can either do it as scheduled or November?

MR. TULMAN: As scheduled or November.

THE COURT: All right. And the government has advised my deputy that they don't think the reasons for seeking the adjournment are valid, but I gather since I have another trial date that's up in the air because this trial date is up in the air, their office is taking the position, with a capital "O", that ideally, they would like that other case to go first with this case not slipping very much.

Is that fair to say?

MS. NICHOLS: Yes, Your Honor.

THE COURT: I guess the other question I have is whether everybody in this room plans to stay on the case through the trial. Ms. Shellow said that Mr. Rico may be asking to be relieved.

MS. SHELLOW: Mr. Rico may be asking to be relieved. Once the scheduling issues came up, he did not file a motion to withdraw so that he could be available to accommodate Your Honor's schedule if there was -- if his presence is helpful.

THE COURT: Well, Mr. Rico is always helpful; just a good guy to have around. All right. But everybody who is here is planning on staying in? I've got to say, I don't see how the reasons that have been advanced just by postponing the trial. Ms. Shellow has another client who will need some attention in May and June, but it doesn't seem like an unavoidable conflict. Certainly not -- she's not going to have to be with him on a daily basis, and that other matter is starting two weeks before this one; and I understand how busy the run-up to trial is, but it gets really crazy once you get the 3500, and that's in the time where that other matter will already be off the ground.

And I have got -- I have got detained defendants here. It's a murder case. I don't see how I can say it's in their interests to put the trial off for four months when you have four months when -- well, that's the reason. I also don't see how I could say it was in the best interests of the public to do that.

So I think we leave this trial date where it is, and I know that's going to make the government unhappy in another case, but so be it.

If that means that it makes sense for Mr. Rico to stay in the case representing Mr. Davis, he should do that. If there is a reason why he can't or he shouldn't, but Ms. Shellow, you want other co-counsel appointed, then we still have five months to trial, so I think the -- and Mr. Miedel already has

co-counsel. So I think any time crunch come June can be alleviated in large part with co-counsel. So we are going to just leave this where it is.

MS. SHELLOW: Your Honor, I will just draw to your attention, Mr. Rico is starting a trial in the Eastern District before Judge Matsumoto on the 24th of June. So his availability, I think, will be limited for a trial that starts on July 8th.

THE COURT: Well, I don't know who set the trial date first, but this trial date has been set for a long time. If he tied himself up, I can't really help him with that.

What I would say is, first of all, you never know what's going to happen. Maybe his client in the Eastern District isn't going to go. Maybe that trial will slip, but if the time that you will have to devote to your other client is going to be significant, and you need co-counsel in this case, and it can't be Mr. Rico, we should get somebody else --

MS. SHELLOW: Right.

THE COURT: -- now because -- while there is still five months to prepare. I don't want to hear, you know, in April, oh, my God, I need another lawyer appointed.

MS. SHELLOW: Thank you, Your Honor.

THE COURT: All right. I have a slew of motions to rule on. Mr. Hines' motion is now moot because he has resolved his case.

Although I do think the government needs to educate the agents involved in that suppression motion that when the defendant says he doesn't want to talk without a lawyer, it's not cool to then say, "Well, in that case, I am not giving your cousin's phone back." That looks like the agent is trying to coerce the witness -- the defendant. So I am not sure that -- I don't think that was defensible, that particular action, and the agents ought to be aware of that.

Let me turn to now the motions to suppress Facebook evidence. Mr. Fennell made a motion, and Mr. Young made a motion. I have read the papers. Anything anybody wants to say on those particular motions that's not covered by the papers?

MR. TULMAN: I will rely on the record, Your Honor.

MR. BACHRACH: I can rely on the record with one thing I just thought would be helpful, and may or may not be helpful.

I noticed in the government's brief there was a remark that we didn't understand why the one particular Facebook entry that it was referring to was a private or a "friends only" message versus a public message or -- and I -- there is an easy answer to that to explain that -- that difference, why I am only really focusing on the private instead of public.

If you look at Exhibit H, which is the Facebook entry?

THE COURT: Hold on. Okay. I am with you.

MR. BACHRACH: If you see the date, April 26th, which is the date of the Facebook post, just to the right of it is an

icon for two people. That indicates through Facebook that it's a message between -- from the inmate -- excuse me -- from the individual to his Friend list. There is no way of telling from this whether it's just friends or friends of friends as well. That would require additional information that's not part of the record; but if that indicates that it's only to Facebook friends; if this was a public post instead of having two -- an icon of two individuals, you have an icon of a globe.

So that is why this one, as opposed to the other Facebook posts, are the ones that we have focused in on, and we did not move to suppress any of the posts where there was a globe because we knew that those are then public. That was the only thing I thought might be worth correcting on the record.

THE COURT: All right. Thank you. Let's start with Mr. Fennell's motion. He argues that the fruits of the search of his Facebook account should be suppressed because the search warrant for that content was overbroad in that it had no time limitation, and that even though the affidavit in support of the search warrant only showed probable cause for criminal activity and Facebook use in furtherance of that activity beginning in 2016, Facebook apparently provided information going back to 2011.

Overbreadth deals with the requirement that the scope of the warrant be limited to the probable cause on which the warrant is based. Thus, a warrant can violate the Fourth

Amendment if it seeks specific material as to which no probable cause exists. *U.S. against Cioffi*, 668 F. Supp. 2d 385 at 390, Eastern District 2009. So, quote, "An otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause on which the warrant is based." Unquote. *U.S. against Galpin*, 720 F.3d 436 at 446, and I've left out internal quotation marks and citations.

Warrants that do not link the evidence sought to the criminal activity supported by the probable cause do not satisfy the particularity requirement because they lack meaningful parameters on an otherwise limitless search of a defendant's electronic media. *U.S. against Ulbricht*, 858 F.3d 71 and 99 to 100. Cert. denied. 138 Supreme Court 2708. There is no clear rule from the Second Circuit on what time limits are required in search warrants.

And now I am going to have a long quote from a case called Cohan, *U.S. v. Cohan*, 628 F. Supp. 2d 355 at 365 to 67, Eastern District 2009. That case said as follows: "In a number of out-of-circuit decisions, courts have found warrants for the seizure of business records constitutionally deficient where they imposed too wide a timeframe or failed to include one all together. Still, other out-of-circuit decisions have not treated a warrant's lack of a timeframe as dispositive. Amongst the district courts in this circuit, while there is general

agreement that a timeframe is relevant, there is no apparent consensus as to when one is required." See, for example, *U.S. v. Costin*, 2006 Westlaw 2522377 at page 11, where the Court said, "A warrant's failure to include a time limitation where such limiting information is available and the warrant is otherwise wide-ranging, may render it insufficiently particular." Unquote. *Triumph Capital*, 211 F.R.D. at 58, which said, "A temporal limitation in a warrant is not an absolute necessity, but is only one indicium of particularity." *U.S. against Gotti*, 42 F. Supp. 2d, 252 at 274, S.D.N.Y. 1999, where the Court says, "Nor, in light of the circumstances and the fact that the brokerage company at issue there was believed to have served only as an instrumentality of racketeering, is the warrant defective because it contained no time limitations." Blumberg 1998 Westlaw 136174 at 7; stating that the presence of a timeframe in a warrant is a factor the Court should consider in its analysis. *U.S. versus Hickey*, 16 F. Supp. 2d, 223 at 239, E.D.N.Y. 1998, where the court says, "Clearly the warrants being devoid of a time limitation authorized searches for documents that both predate and postdate the periods of charged criminality. This void supports defendants' overbreadth argument." *Roberts versus United States*, 567 Eastern District 2009656 F. Supp. 929, 935, S.D.N.Y. 1987, where the Court says, "With no limit as to the dates of the documents to be seized, the warrant authorized a generally exploratory rummaging in the

person's belongings." That was reversed on other grounds in the 852 F.2d 671; and *Zanche*, 541 F. Supp. at 210, where the Court said, "While I do not agree that a limited timeframe will never be called for...courts in this circuit have approved warrants for business records unrestricted by time limitations." Unquote. That's all from *Cohan*. See also *U.S. v. Jacobson*, 4 F. Supp. 3d 515 at 526, E.D.N.Y. 2014, where the warrant's failure to include the temporal limitation in that Court's view might, in certain circumstances, render the warrant insufficiently particular, but the court noted there was no consensus in the circuit as to when such a limitation is required.

And *U.S. v. Hernandez*, 2010 Westlaw 26544 at page 11, S.D.N.Y., January 6, 2010, where the Court said, "The complexity and duration of the alleged criminal activities render a timeframe less significant than in a case that required a search for a small set of discrete items related to one or only a few dates."

Here, the events don't relate to one or only a few dates, but on the other hand, the case was not particularly complex, and it would not have been difficult to provide a timeframe. Courts outside the circuit have held that, quote, "Failure to limit broad descriptive terms by relevant dates when such dates are available to the police will render a warrant overbroad." *U.S. against Abboud*, 438 F.3d 554 at 576, Sixth

Circuit 2006.

That court also said that a finding of overbreadth requires severance of the inferred portion of the warrant from the remainder which passes constitutional muster and suppression of the evidence relating to the period for which the affidavit did not contain probable cause. Again, *Abboud* at 576.

It may well be that the search warrant here was overbroad, but I need not reach a definitive conclusion on that subject because suppression is not required if a good faith exception applies. *U.S. against Leon*, 468 U.S. 897, the Supreme Court held that a violation of the Fourth Amendment does not justify exclusion of the resulting evidence when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. That's *Leon* at 920. The court reasoned that in the ordinary case an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. That's at 921.

Accordingly, it concluded that where an officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues is objectively reasonable or reviewing court's subsequent determination that the warrant was constitutionally infirm will not trigger the exclusionary rule. That's *Leon* at 92, see *Massachusetts v. Sheppard*, 468 U.S. 981 at 989 to 90, where the

Court said, quote, "We refuse to rule that an officer is required to disbelieve a judge who has just advised him...that the warrant he possesses authorizes him to conduct the search he has requested."

The good-faith inquiry is confined to the objectively ascertainable question, whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. *Leon* at 922, note 23.

It requires officers to have a reasonable knowledge of what the law prohibits, 919 note 19, and thus will not apply if the warrant is so facially deficient. In other words, for failing to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonably presume it to be valid. That's at 923.

Other courts have held, and I agree, that, quote, "The absence of a clear rule in the circuit on the subject" -- excuse me, "the absence of a clear rule in this circuit," unquote, regarding whether the failure to include a timeframe renders the warrant invalid, quote, "supports a conclusion that the officers acted in good-faith reliance on the warrant," unquote. *U.S. versus Nguyen*. 2014 Westlaw 1512030 at page 20, Western District, April 7, 2014. Collecting cases. Report and recommendation adopted 2014 Westlaw 1795045, Western District, May 6, 2014.

As the court in Cohan held, quote, "In light of the

conflicting authorities, the court would have to speculate as to how the Second Circuit would decide when, if at all, the lack of a timeframe would render a warrant for seizure of business records overbroad. However, the Court need not do so because this uncertainty triggers the good-faith exception to the exclusionary rule recognized in *U.S. versus Leon*."

Since the Second Circuit has never addressed when, if at all, timeframes are a constitutional requirement in business records search warrants, and district courts in this circuit have not converged upon a clear rule, the court cannot say that any reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. That's *Cohan* at 355, see *U.S. against Westley*, 2018 Westlaw 3448161 at page 17, District of Connecticut, July 17, 2018, which found the good-faith exception applicable in part because quote, "Courts have yet to delve fully into the complexities of the application of the Fourth Amendment to social media," unquote, including, quote, "whether and how to require date restrictions on dynamic content of the type found in social media accounts." Unquote.

So I am denying the motion to suppress on the basis of the good-faith exception.

Mr. Young has a different motion. He argues that the contents of his account should be suppressed because the government did not give a search warrant for them, and he did

not consent to the government seizing those contents.

For a Fourth Amendment violation to exist, the government must violate a reasonable expectation of privacy. A reasonable expectation of privacy exists where the defendant has a subjective expectation of privacy, and it's one that society recognizes as reasonable. *Katz versus United States*, 389 U.S. 347.

"Whether the Fourth Amendment precludes the government from viewing a Facebook user's profile absent a showing of probable cause depends, among other things, on the user's privacy settings." *U.S. versus Meregildo*, 883 F. Supp. 2d 523 at 525, S.D.N.Y. 2012. Facebook allows an account to be private, to be available only to people who "friend" the account holder or whom the account holder himself "friends;" to be available not only to friends, but to friends of friends or to be public. *U.S. versus Devers*, 2012 Westlaw 12540235 at page 2, Northern District of Oklahoma, December 28, 2012. See Westley at page 6.

In the context of electronic publication of information on Facebook, defendants have the burden of establishing -- defendants have the burden of establishing standing, or in other words, a subjective expectation of privacy in their Facebook pages that society is prepared to recognize as reasonable. *Devers* at page 2. Here, "Defendants have not provided affidavits or any other facts concerning the privacy

settings on their Facebook accounts or any steps they took to keep their Facebook content private." *Westley* at 6. Because defendants have not submitted any information regarding steps they took to keep their Facebook content private, they have not met their burden to demonstrate that they had a reasonable expectation of privacy in the information searched, and the motion fails on this ground alone. Westley at 7.

In any event, the government represents that the Facebook evidence of Young that it obtained it got either from public posts or via an undercover account where the undercover was a friend of Young. Meaning, either that Young "friended" the undercover, in that Young sent a request to the undercover to be Facebook friends and the undercover accepted, or more likely, the undercover "friended" Young, and Young accepted.

There is no expectation of privacy in an open Facebook page. *U.S. versus Adkinson*, 2017 Westlaw 1318420 at 5, Southern District of Indiana, April 7, 2017. And where defendant has shared his Facebook posts with friends, he does not have expectation of privacy that society recognizes as reasonable. As Judge Pauley held in *Meregildo*, 883 F. Supp. 2d 526, quote, "where Facebook privacy settings allow viewership of postings by friends, the government may access them through a cooperating witness who is a friend without violating the Fourth Amendment." Unquote. The same is true of a "friend," in quotation marks, who is an undercover.

Judge Pauley goes on in Meregildo as follows: Quote, "While defendant undoubtedly believed that his Facebook profile would not be shared with law enforcement, he had no justifiable expectation that his friends would keep his profile private, and the wider his circle of friends, the more likely his posts would be viewed by someone he never expected to see them. The defendant's legitimate expectation of privacy ended when he disseminated posts to his friends because those friends were free to use the information however they wanted, including sharing it with the government. When the defendant posted to his Facebook profile and then shared these posts with his friends, he did so at his peril." Unquote.

In short, the Fourth Amendment does not guard against the risk that the person from whom one accepts a friend request and to whom one voluntarily discloses information might turn out to be an undercover officer or a false friend. *Everett versus State*, 186 A.3d, 1226 at 1236, Delaware 2018. See *Devers* at 2, where the court said, "unless the defendant can prove that the Facebook account contained security settings which prevented anyone from accessing the account, the legitimate expectation of privacy ended when they disseminated posts to their friends because those friends were free to use the information however they wanted, including sharing it with the government." *U.S. versus Soderholm*, 2011 Westlaw 5444053 at page 7, District of Nebraska, November 9, 2011, where the court says that the

defendant's files were restricted to friends did not alter the fact that they were no longer private and that the defendant bore the risk that material he shared with friends would find its way to law enforcement, and even if the defendant had a Fourth Amendment interest by designating an undercover as the friend, the defendant voluntarily consented to the undercover viewing and downloading the material. And *U.S. versus Gatson*, 2014 Westlaw 7182275 at page 22, District of New Jersey, December 16, 2014, which found no Fourth Amendment violation where law enforcement officers used an undercover account to become Instagram friends, and the defendant accepted, and that -- and the courts concluded no search warrant was required for the consensual sharing of the information the defendant posted, and that was affirmed at 744 Fed. Appendix 97.

So the motion to suppress Mr. Young's Facebook evidence is also denied because he has not shown a subjective expectation of privacy in the material at issue; and even if he had, it is not one society recognized as reasonable because he shared the information with others; and even if he had an expectation of privacy, he consented to sharing information with the undercover. If the facts at trial develop differently than represented or if the government can't lay a proper foundation, the defendant may have grounds to renew if he can make a threshold showing that he has not made here.

Next is Mr. Young's motion to suppress three sets of

statements: Two made while he was in the hospital and one made post arrest. Anybody want to add anything on that?

MR. BACHRACH: Defense rests -- relies on its papers, Your Honor.

MS. NICHOLS: Nothing further from the government, Your Honor.

THE COURT: All right. Let's see, the first issue is whether the defendant was in custody when he made the statements. There is no dispute that he was in custody when he made the third set of statements, which was after he was arrested, but the parties dispute whether Mr. Young was in custody when he made the -- when he was first interviewed at Westchester Medical Center on February 28th of 2017 and the second time he was interviewed when he was at Helen Hayes on March 6th, 2017.

Miranda warnings are not required when the defendant is not in custody. *Beckwith versus United States*, 425 U.S. 341 at 346 to 47. The test for determining custody is an objective inquiry that asks whether a reasonable person would have thought he was free to leave or end the police encounter at issue, and whether a reasonable person would have understood his freedom of action to have been curtailed to a degree associated with formal arrest. *U.S. versus Faux*, 828 F.3d 130 at 135. The Faux court went on to explain that although both elements are required, the second is the "ultimate inquiry" because the "free-to-leave

inquiry" reveals only whether the person has been seized. Not all seizures amount to custody. A seizure is a necessary, but not sufficient, condition. Further, an individual's subjective belief about his or her status generally does not bear on the custody analysis. Thus, in determining whether a defendant was in custody, the court must first determine whether in light of the objective circumstances of the interrogation, a reasonable person would have felt that he was at liberty to terminate the interrogation. If the answer is yes, the inquiry concludes. If, on the other hand, a reasonable person would not have felt free to do that, the court must proceed to the second step and determine whether a reasonable person would have understood his freedom of action to have been curtailed to a degree associated with formal arrest. Only if the answer to the second question is yes, was the person in custody for practical purposes and entitled to the full panoply of protections prescribed by Miranda. *U.S. versus Parker*, 116 F. Supp. 3d, 159 at 169 to 70, Western District 2015.

When the individual's freedom of movement is otherwise limited, the free-to-leave analysis is inapplicable, and the appropriate inquiry is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter. *Florida v. Bostick*, 501 U.S. 429 at 436.

An individual who understands that his detention is not likely to be temporary and brief, and feels that he is

completely at the mercy of the police, could reasonably deem his situation comparable to formal arrest. Relevant considerations include: One, the interrogation's duration; two, its location, for example, at the suspect's home, in public, in a police station or at the border; three, whether the suspect volunteered for the interview; four, whether the officers used restraints; five, whether weapons were present and especially whether they were drawn; and six, whether officers told the suspect he was free to leave or under suspicion. *Bostick* at 436, see *U.S. versus Fnu Lnu*, 653 F.3d 144 at 153, which noted that the circumstances also include the nature of the questions asked.

Several circuits have concluded that Miranda custody is not established merely because an interview occurs in a hospital and the defendant is receiving medical treatment. *U.S. versus Parker*, 116 F. Supp. 3d at 171. Collecting cases. The analysis requires, quote, "Careful differentiation between police-imposed restraint and circumstantial restraint." Unquote. *U.S. versus Jamison*, 509 F.3d 623 at 629, Fourth Circuit 2007. That court explained that in dissecting the perceptions of a reasonable person, the court must be careful to separate the restrictions on his freedom arising from the police interrogation and those incident to his background circumstances. That is, to the extent that the defendant feels constrained by his injuries, the medical exigencies they have created, such as the donning of a hospital gown and the

insertion of an intravenous line, or the routine police investigation they initiated, such limitations on the defendant's freedom should not factor into the reasonable person analysis. *Jamison* at 629. See *U.S. against Casellas*, 149 F. Supp. 3d, 222 at 240 to 41, District of New Hampshire 2016. In that case the defendant was in the hospital after a gunshot wound, but he was not in custody where the staff came and went. Also there were only two officers. They did not restrain -- the defendant was a she, actually -- they did not restrain the defendant, even though she was confined to bed, and the interview was lengthy but relaxed and cordial.

Here both hospital interviews are on video. The video is clear with respect to both that nothing occurred that would have led a reasonable person to believe he could not end the encounter. Defendant was confined because of his injuries, not because of anything the police did.

The police never indicated that the defendant had to talk. Hospital personnel had access to the room, and I note that the cops did not, as the defendant suggests, shoo anyone away. The video shows that a nurse who came in asked who the officers were, and when she found out, she left of her own volition. Further, the defendant had his phone with him. The officer's tone was calm and not commanding. No guns were displayed. No restraints were used. Only two officers were present. The police asked the defendant for his help, and in

both instances, they gave up in less than an hour when it became clear he was not giving help. They were there about 45 minutes the first time and about 30 minutes the second time.

That conclusion ends the inquiry; the conclusion that a reasonable person would not have believed he could not end the encounter. And even if the defendant could have thought he was not free to end the encounter, he could not have thought he was subject to restraints comparable to a formal arrest essentially for the same reasons. So no Miranda warnings were required for the hospital interviews, although they were for the postarrest interview.

In any event, Miranda warnings were given all three times. The defendant says with respect to the hospital interviews, that the warnings did not suffice because his waiver was not knowing in that he was in such a condition that he could not understand them. His affidavit does not say that he did not understand or that his medications affected his ability to do so. He has provided medical records showing that he was on a lot of different medications, but that does not show that he did not understand what was going on, and the videos revealed that he did. Defendant's responses to the police show that he was oriented, alert and coherent. His reactions to their questions and answers were appropriate and relevant. I don't doubt that he was on a lot of medicine, but it was not sufficient to render him incapable of understanding what was going on. It's plain

that he did. See *Casellas*, 149 F. Supp. 3d at 244, where the defendant argued that her mental state was compromised because she was a shooting victim on pain medication and experiencing withdrawal symptoms, but there was no evidence that those facts compromised her mental state. Also see *U.S. against Cristobal*, 293 F.3d 134 at 138 to 143, a Fourth Circuit case from 2002 where the suspect was interviewed the day after he suffered multiple gunshot wounds and while he was taking painkillers and narcotics, and he was nevertheless capable of making a knowing and intelligent waiver of his Miranda rights.

Here, each time Mr. Young was interviewed in the hospital, he indicated right-by-right that he understood his rights and wished to talk. Even the second time when he declined to sign a waiver form because he said his mother had advised him not to sign anything, he affirmatively indicated verbally that he understood and wished to talk. So there is no defect in the administration of the Miranda warnings or the defendant's understanding thereof.

Apart from Miranda, due process requires that statements be voluntary. Defendant argues that his waiver was not voluntary because the police led him to believe he was merely a victim when, in fact, he was a suspect because he believed that if he didn't sign the waiver form, his statements could not be used against him. That latter argument, even if true, is irrelevant. It is well settled that a defendant can

waive his Miranda rights notwithstanding his refusal to sign a written Miranda waiver form. *U.S. versus Downs*, 2014 Westlaw 3736056 at page 3, District of Vermont, July 29, 2014. And that was affirmed, although I don't have the cite, and that case cited *Berghuis versus Thompkins*, 560 U.S. 370, and *Plugh*, 648 F.3d 118.

The focus is not on the defendant's subjective belief, but what a reasonable person in his position would believe. Defendant points to nothing that would have led a reasonable person to believe that refusing to sign, but verbally agreeing to talk, after being advised that what he said could be used against him, meant that his statements were somehow protected. Coercive police activity is necessary to make a statement involuntary, but defendant's unilateral misunderstanding will not suffice. *U.S. versus Williams*, 2004 Westlaw 1637026 at page 2, S.D.N.Y., July 20, 2004. Suppression is a prophylactic remedy designed to prevent and deter police misconduct. It would make no sense to apply it where the police do not do anything wrong, but the defendant, for idiosyncratic reasons of his own, made an incorrect legal assumption. A defendant's quote, "misunderstanding about the purposes for which his statements could be used did not stem from misrepresentation by the... investigators and therefore does not on its own constitute a showing of police coercion sufficient to warrant suppression of his statements." Unquote. *U.S. versus Male*

Juvenile, 280 F.3d 1008 at 1022 to 23, Ninth Circuit 2002. See *U.S. versus Bowles*, 2005 Westlaw 2271920 at page 3, District of Maine, September 15, 2005 where the court said unilateral mis-understanding would not suffice to render a Miranda waiver involuntary. The focus is on curbing abusive police practices. Report and recommendation adopted. 2005 Westlaw 3115865 November 21st, 2005.

That leaves defendant's argument that he was tricked or misled regarding his status. "The test of voluntariness of a confession is whether an examination of all the circumstances discloses that the law enforcement" -- excuse me -- "that the conduct of law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined." *U.S. versus Okwumabua*, 828 F.2d 950 at 952 to 53. "Simple failure to inform defendant that he was the subject of an information does not amount to affirmative deceit unless the defendant inquired about the nature of the investigation and the agents' failure to respond was intended to mislead." *U.S. versus Serlin*, 707 F.2d 953 at 956, Seventh Circuit 1983. A valid waiver of the Fifth Amendment right does not require that an individual be informed of all information useful in making his decision or all information that might affect his decision whether to speak. The Supreme Court has never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his

self-interest in deciding whether to speak or stand by his rights. *Colorado v. Spring*, 479 U.S. 564 at 576 to 77. However, sins of commission are different from sins of omission.

Quote, "Affirmative misrepresentations by the police may be sufficiently coercive to invalidate a suspect's waiver of the Fifth Amendment privilege." Unquote. *U.S. versus Anderson*, 929 F.2d 96 at 100. To prevail on a claim of trickery and deception, a defendant must produce clear and convincing evidence that the agents' affirmatively misled him as to the true nature of their investigation. It must also be shown that the misrepresentations materially induced the defendant to make incriminating statements. Inculpatory statements are not involuntary when they result from a desire to cooperate, or from a defendant's ignorance of, or inattention to, his right to remain silent. Further, agents' failure to fully explain the purpose of the interviews does not amount to affirmative deceit unless the defendant inquired about the nature of the investigation and the agents' failure to respond was intended to mislead. *U.S. versus Mitchell*, 966 F.2d 92 at 100. Statements are not involuntary because a defendant's ignorance has caused him to fail to assert his privilege against self-incrimination. *U.S. v. Mast*, 735 F.2d 745 at 750. "The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Colorado v. Spring*, 479 U.S. at 574.

With respect to the February 28, 2018 interview, defendant says the police tricked him into believing he was only a witness or a victim and not a suspect and that they were reading the Miranda warnings only to protect him in case he was the one who threw a bottle and started the melee at the Valentine's Day party that resulted in Mr. Young being paralyzed and Mr. Owens Grant being killed, among other things.

The defendant's description of the events over-simplifies what happened. The video shows that the officers said that the police were trying to figure out what happened and who had shot Mr. Young; that they didn't know yet; that there was a lot going on, and it was chaotic that night, and that they quote, "Were having a hard time figuring out if you threw a bottle or someone else threw a bottle or he shot or she shot or what have you." Unquote. That's about 7 -- at about the 7-minute mark on the recording.

And they went on to say that they were therefore reading Miranda warnings to everyone just in case it turns out that the defendant threw a bottle and someone got stitches. It's clear that that last part was by way of example because moments before, the officer had raised the possibility, not just of throwing a bottle, but of shooting a gun. The officers made clear from the outset that it was possible the defendant had criminal exposure. They went on to say that they wanted to get the investigation right and that it's a serious matter because

the defendant was a shooting victim, which was obvious. Saying the defendant was a shooting victim was not any sort of assurance that he was only a victim or would not have any criminal exposure. To the contrary, the officers had made clear that the defendant might well have such exposure. I do disapprove of the officers' statement that the Miranda warnings were, quote, "legal mumbo-jumbo" as well as his rushed reading of the rights, but that inappropriate conduct, which could be regarded as devaluing important constitutional rights and about which the government ought to educate the officer, does not detract from the fact that the defendant heard each right, said he understood each right, signed a waiver, and could not have been under the impression that the police did not suspect any criminal behavior on his part.

Assuming that the agents, in fact, suspected the defendant of doing worse than throwing a bottle, any failure to fully explain the purpose of the interviews does not amount to affirmative deceit unless the defendant asks and the agents intentionally mislead. *Mitchell* at 100. No such inquiry was made here. Further, within five minutes of the warnings, which were in 8:27 on the tape, the officer at 13:00 or 13 minutes of the tape, made clear that he knew Mr. Young was lying to him. He said -- and again, I don't approve of this language -- quote, "I'm not an idiot. Don't play me for a retard." Unquote.

And he reiterated his scepticism three minutes later

at 16 minutes where he said to Mr. Young, "I know from the video that you were shot at 3:00 in the morning, so I don't know why you keep saying you left the party at 8:30 or 9:00."

At 19:50, the officer tells the defendant that the only thing worse than being in the physical condition the defendant was in was being in that condition in prison.

At 27:15, the officer says he's confident that he can prove the defendant had a gun and pulled the trigger. At 35 minutes, the officer says, the defendant's not going to be able to start to remember when the officer arrests him, and at 39 minutes the officer tells the defendant he does not want to be putting cuffs on the defendant the next time he sees him.

Defendant, in other words, was told again and again that he is a suspect, but each time he continued to talk, belying his claim that he would not have spoken had he known he was a subject or a target.

The defendant's, quote, "Apparent understanding of his precarious situation and disregard of this danger is an additional basis for finding that the withholding of the information did not impact his free choice to testify." Unquote. *U.S. against Valdez*, 16 F.3d 1324 at 1330.

So I find that the defendant has not shown by clear and convincing evidence either that the officers affirmatively misled him on February 28th or that any misrepresentations materially induced him to inculpate himself, even if more

information might have been helpful to the defendant in calibrating his self-interest.

One of the last things the officers said on February 28th at 42 minutes and five seconds is that the defendant was a shooting victim, but that did not mean he was not also a suspect. Despite that having been made abundantly clear, the defendant claims with respect to the March 6, 2017, interview that he thought that if he did not sign a form, his statements cannot be used against him, which I have already addressed; and that when he expressed concern that the police viewed him as a suspect, they tricked him by assuring him that he was viewed as a victim. Again, that does not fairly represent what happened. It was clear from the previous interview that they viewed him as a suspect, and on this occasion at 2 minutes and 40 seconds, the officer gave Mr. Young each Miranda warning, and each time Mr. Young said he understood, and he said he -- affirmatively that he wanted to talk.

The officers made crystal clear right from the start that they think the defendant is lying to them. They point to, and show him, evidence that contradicts what he has told them. At one point, at 17 minutes and 30 seconds, the defendant says, "You are acting like I am a suspect. I am the victim." Unquote. At that point someone comes in to speak to the officer, and he steps out. When he returns, he says he is just

trying to figure the case out. He says nothing that could reasonably be interpreted as assuring the defendant is not a suspect and was viewed only as a victim. The entire arc of their conversations going back to the first conversation on February 28th makes any such claim meritless.

At 22 minutes and 30 seconds, the defendant again says he is the victim and the police are making it seem like he is a suspect. The response, which was along the lines of the final remark back from February 28th was, quote, "Somebody shot you, so you are a victim whether you had a gun or not, but you are not being straight with us." Unquote. Again, making clear that being a victim and being in trouble are not mutually exclusive. The officer added, "You are still a victim and still being treated that way, but we got to be straight with you. We are sure you remember more than you are saying." Unquote.

And after each of these exchanges, the defendant again keeps talking. So, again, it's not just -- it's just not plausible that he would not have spoken had he known that he was not merely a witness or victim. He was told pointblank on February 28th that being a victim did not mean he is not a suspect. He repeatedly says he is being treated like a suspect. He gets no assurance to the contrary, and he keeps on talking. So he has not shown by clear and convincing evidence either that the officers affirmatively misled him on March 6th or that any misrepresentations materially induced him to inculpate himself.

With respect to his postarrest statements, the defendant concedes he was not tricked or overmedicated, but he says he was, as he was on the earlier occasions, young, uneducated and susceptible to manipulation, so he was unable to understand that refusing to sign was insufficient to invoke his rights or voluntarily make a decision to waive.

The government responds that the defendant, after being given his rights, declined to sign a form but did not invoke his rights and spoke, including asking the agents questions; and that his mistaken belief that his statements could not be used against him because he did not sign does not assert any violation of his rights. That much is true, but the burden is on the government to show a knowing and voluntary waiver. For example, *U.S. v. Smith*, 2015 Westlaw 7177190 at page 4, E.D.N.Y., November 16, 2015, which said, quote, "To introduce a defendant's custodial statements at trial, the government must show by a preponderance of the evidence that the defendant knowingly, intelligently and voluntarily waived his Miranda rights against self-incrimination. Thus, the government bears the burden of proving by a preponderance of the evidence both that the defendant was advised of his constitutional rights under Miranda, and that he knowingly, intelligently and voluntarily waived those rights."

Because we do not have a recording of this postarrest interaction, nor do we have an affidavit or any other evidence

of the circumstances of the statements the defendant made on the date of his arrest, the prudent thing is to have a hearing at which the government can demonstrate that the statements were made after a knowing and voluntary waiver, assuming it's going to introduce those statements at trial.

So the motion to suppress the February 28, 2017, statements is denied. The motion to suppress the March 6, 2017, statements is also denied, and we will have a hearing on the postarrest statements at a date we will set later on.

Anybody want to say anything on the motion to dismiss the 924(c) and 924(j) counts?

MS. SHELLOW: No, Your Honor.

MR. TULMAN: No, Your Honor.

MR. BACHRACH: No, Your Honor.

THE COURT: I am assuming the defendants are making this motion mostly to preserve the issue, which is fine. *U.S. v. Barrett*, which is 903 F.3d 166 at 184, precludes the argument that the risk of force clause is void for vagueness. Here at trial the jury will decide if the facts amount to a crime of violence to the extent it relies on the risk of force clause of 924(c), but because the 924(c) and 924(j) charges in the S4 Indictment don't link simply to Count One, the RICO conspiracy, but also link to specific drug trafficking crimes or crimes of violence, it's unlikely the jury will be relying on the risk of force clause. So dismissal would not be appropriate even if a

RICO conspiracy with violent crime or drug trafficking predicates is not itself a crime of violence or a drug trafficking crime. See *U.S. against Russell*, 2018, 3213274 at page 3, Eastern District, June 29, 2018. In any event, even if the RICO conspiracy count were the only hook of those 924(c) and 924(j) counts, *Barrett* at 175 to 77 reiterated that a conspiracy to commit a crime of violence suffices as a predicate under 924(c). *Barrett* involved a robbery conspiracy, but I expect that when presented with a racketeering conspiracy charge with predicate acts of violence, the circuit is going to reach the same conclusion. See *U.S. against Scott*, a summary order at 681 Fed. Appendix 89 and 95, which so found. Cert. denied. 138 Supreme Court 642. In other words, a conspiracy to commit a crime of violence is a crime of violence under the force clause, so a RICO conspiracy with violent predicates would be a crime of violence, and here the predicates include murder. See *U.S. against White*, 2018 Westlaw 4103490 at page 4, S.D.N.Y., August 28, 2018, which found a racketeering conspiracy with violent predicates to be a crime of violence. See also *U.S. against Praddy*, a summary order, at 729 Fed. Appendix 21 and 23, which said a RICO conspiracy is a crime of violence if one of its objects is a crime of violence.

If, for whatever reason, *Barrett* is not the law of the circuit at the time of trial, I will revisit all of this, and I also think it might be wise to have special verdicts on the

924(c) counts for the jury to specify, if it convicts, what crimes of violence or drug trafficking crimes it found to be the predicates for each count so that we have a clear record for appeal.

I think the Bill of Particulars motions are moot. Mr. Fennell got the information he was looking for from the government. Mr. Young's was I think mooted by the superseder, and Mr. Hines has resolved his case by pleading out. So unless there is something specific you want me to address, I will move on. All right. I will move on.

What remains is the 3500 discovery Brady issues. The first application is for immediate disclosure of all Brady and Giglio. The standard is well settled. "The prosecutor must disclose evidence if, without such disclosure, a reasonable probability will exist that the outcome of a trial in which the evidence had been disclosed would have been different. And it must disclose such material exculpatory and impeachment information no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made." *U.S. versus Coppa*, 267 F.3d 132 at 142. In other words, a Brady obligation exists only if the withholding of evidence would deprive the defendant of a fair trial determined retrospectively by assessing the effect the withheld evidence would have had on the verdict. Of course, because that is a determination that is

made after the fact, a prosecutor concerned about tacking too close to the wind will err on the side of disclosure as the Supreme Court said in *Kyles v. Whitley*, 514 U.S. 419 at 439.

Here the defendant, I think this was Mr. Young's motion, is asking for four categories of information: One is information that anyone other than the defendant was identified as the shooter of Mr. Owens Grant known as "G;" second, information indicating a non-racketeering motive for that shooting; third, information indicating that defendant was not a member of the enterprise.

MR. BACHRACH: Your Honor? I am sorry to interrupt. Mr. Young, who, as you know, has some severe medical issues, desperately needs to use the restroom.

THE COURT: Oh, that's fine. Why don't we take a ten-minute break?

MR. BACHRACH: Thank you, Your Honor.

(Recess taken.)

THE COURT: Everyone can have a seat.

We were talking about the categories of Giglio and Brady that Mr. Young was seeking. The third one was information indicating he was not a member of the charged enterprise; and the fourth was any Giglio material that's material to the outcome, including prior inconsistent statements, reports reflecting variations of witness statements, indications of bias, substance abuse or mental health issues that affect the

ability to perceive and recall.

All four categories have to be turned over, and they have to be turned over in time for the defendants to make use of them. Although Categories 1 through 3, seems to me, could require more significant pretrial investigation than Category 4. The government here has given me an ex parte submission and sought to withhold certain information for safety reasons. There is no exception to Brady for safety reasons, so sooner or later, the government is going to have to take steps to protect witnesses in sufficient time to make its disclosures in sufficient time for the defense to make use of that information.

However, a lot of what the defendant seeks I don't think is Brady or Giglio, and I want to take a little time to go through some of it. The government provided me with a September 21, 2018, letter that it provided the defendants, and using that information, Mr. Bachrach supplemented his application and has theories on why various things need to be turned over. The government also provided the underlying materials that it didn't give the defendants, but I've looked at them, and here is what I think: First, as to Witness 1, who is described in the October 21st -- excuse me -- September 21st letter, the defendant says Witness 1's statements are Brady because the witness said that Mr. Owens Grant, who I am just going to call "G" was shot by a tall, dark-skinned guy, but he did not identify the defendant in a photo array, so that must

mean that the witness was saying the shooter is not a defendant. It's not at all clear that the witness was even saying that "G" was shot by a tall, dark-skinned guy. The photo arrays, which the government did provide to the defendants, the way I read them, and going by the times that are written on them, first the witness said he didn't recognize anyone in the array that contained Mr. Young. He then identified someone named Rayshon Holmes in the second array as a guy he knew as "Shablacky," who got shot in the back, and he then identified "G" in the third array, and what the officer wrote is, quote, "'G' tall, dark-skinned guy shot him." Unquote. Which could easily mean that "G" is the tall, dark-skinned guy who shot Shablacky. If so, it has nothing to do with Mr. Young. If what the officer wrote meant that a tall, dark-skinned guy shot "G," I don't know how tall Mr. Young is, but he arguably fits that description, and if so, the fact that the witness didn't pick Mr. Young out of an array isn't really Brady. One could easily be able to give a general description of someone but not have gotten a good enough look to pick someone out of an array, especially in a dark, crowded party during a few chaotic moments. So I don't see that that account is Brady. It's certainly not favorable that the defendant fits the witness's description of the shooter, and dark-skinned seems like a fair description of Mr. Young, and he is seated, but he doesn't look particularly short to me. So I don't think this is really Brady, but in any

event, the defense has everything except the witness's name, and can follow up with Shablacky if possible. But more fundamentally, the failure to pick the defendant out I think is just meaningless here.

The second witness, who was identified by name, the co-defendant, Mr. Branch, known as "Bigga," the defendant says that his statements are Brady because he identified someone else as the shooter, and the defense argument is that the summary that the government gave is not as complete as what might be in notes or reports, but the defense certainly has enough there to follow up because they know who to talk to. So the information is exculpatory, and the defendants know where to go to get it.

The defendant argues that Witness 3 statements, the statements of Witness 3 need to be disclosed under Rule 16(a)(1)(E) because the redacted notes that were disclosed contain unfavorable information. I am baffled by this argument. Rule 16(a)(1)(E) relates to the government's obligation to turn over documents and objects. It does not require the turnover of witness statements before the time designated in Section 3500 or the statements of witnesses that the government does not intend to call, which I am sure counsel well knows, and Rule 16(a)(2) makes abundantly clear.

As to Witness 4, the defendant argues that this witness's statements are Rule 16 as to Mr. Fennell and potential Brady as to Mr. Young because the witness identified

Mr. Fennell, but not Mr. Young, as the shooter. For the same reasons, an inculpatory statement is not Rule 16 as to Fennell; and as to Young, not being able to identify someone as a shooter is not equivalent to a statement that someone isn't a shooter, so I don't regard that as Brady there. There are probably dozens of people who were present who couldn't identify the shooter.

The defendant argues that Witness 5's statements are Rule 16 because the government's summary of Witness 5's statement identifies Young and Fennell and others as shooters, but the government didn't turn over the reports and the notes. This witness's statements are not Rule 16 for the reasons I have discussed, and they are inculpatory, so they are not Brady.

Defendant argues that Witness 6's statements are Brady under the theory set forth in *Mahaffy*, 693 F.3d 113 at 130, which held that statements that are inculpatory as well as exculpatory are Brady if the exculpatory character harmonizes with the defense theory. Mr. Young says that's the case here because Witness 6 says that "G" shot first, so that is favorable to a potential self-defense defense that Mr. Young could raise. I guess technically it would be a justification defense under state law. That seems right to me. So the government will have to identify this individual in time for the defense to attempt to speak to that person or do further investigation.

The defendant argues that Witness 7's statements are

Rule 16 because the witness was at the party but didn't observe the shooting, although apparently observed some incidents that evening. Not Rule 16 for the reasons previously discussed and nothing exculpatory in that material, and I have looked at all of the underlying reports, I should make clear.

The defendants argue that Witness 8 should be turned over on the same theory as Witness 6 under *Mahaffy*, and again, same ruling. I agree. So the government will have to identify this person in a timely fashion.

The defendant says Witness 9's statements are Brady because the witness said that Young and Fennell did not shoot first and that Young was shot by "G." It's clear from the report, however, that Witness 9 has no personal knowledge and is only reporting what he heard, and defense counsel can investigate what he says by speaking to the people that the witness spoke about, specifically Shablacky, the bartender and Brian.

Defendant argues that Witness 10's statement is Rule 16 because that witness said that Mr. Young shot Shablacky. That's not Rule 16 for the reasons previously stated, and it's not exculpatory, so it's not Brady; and in any event, this witness did not know anything personally, and having looked at the report, the witness does not even know the identity of the persons that the witness overheard speaking, so identifying her would not be helpful.

The defendant says that Witness 11's statement is Brady because that witness's information is that people other than Mr. Young and Mr. Fennell were the ones who shot "G," specifically that five kids from the city who the witness named were the shooters. Witness 11 did not know anything and only heard a rumor. The report does not indicate from whom Witness 11 heard the rumor. The information provided to the defendants is enough for them to investigate because Witness 11 named the five kids from New York City, and I don't see any indication that the government knows from whom Witness 11 heard this information; but if the government does know, they should let me know because that may be something that needs to be turned over in some form.

The defendant argues that Witness 12 -- Witness 12's information is Brady on the same theory as Witness 11 because Witness 12, as recorded in the September 21, 2018 letter, reported that somebody named "City" shot "G" over an old beef. Witness 12 heard this, but I think the government, having looked at the notes of the interview of Witness 12, I think the government misread those notes. The way I read them -- let me just look at them to make sure I am right -- the way I read them -- hold on. Let me find them and make sure I am correct.

If the government can help me out, I don't know if you have your submission to me.

MS. NICHOLS: We don't have the unredacted submission

with us, Your Honor.

THE COURT: All right. I think it's -- yeah. It's Exhibit M to your submission to me. The way I read those notes, Witness 12 did not say that he heard someone named "City" shot "G" over an old beef. He said that he heard that someone from the north side of the city shot "G" over an old beef, and when the government goes back to look at these notes, they should focus on the arrow at the top of the page. So it's pretty clear to me what the witness said was that he heard someone from the north side of the city shot "G". If that lets out members of the Southside Gang, that is helpful to the defense, except, as with Witness 11, Witness 12 only heard this rumor and does not say from whom, but if the government knows from whom, again, they should let me know because at some point that lead may need to be disclosed.

As to Witness 13, again, the defendant argues it's Brady because, as with Witness 11, because Witness 11 says that "Bigga," Mr. Branch, and someone named Alex King were shooting, and that "Bigga" might have shot "G" because "G" shot Mr. Young. Witness 13 doesn't have any knowledge. He only heard this, and he only described generically who he heard it from, some people in a club. There is information for defense counsel to work with here. They can speak to "Bigga," and they can speak to this Alex King, but again, if the government knows the source of Witness 13's information, they need to let me know.

And finally, there is somebody designated as CI-1, which the defense again argues should be turned over under a *Mahaffy* theory because CI-1 said that "G" shot first, and Mr. Young returned fire. CI-1 did not know anything personally but heard afterwards that Mr. Young and his crew had robbed "G" and his crew earlier in the day, and when they crossed paths at the party, "G" started shooting at Mr. Young; and CI-1 also heard that Mr. Young, nicknamed "Hollywood," was at the party with someone named "Marquis" and other people who hung out on South and Chambers Street. Again, CI-1 got this information from someone else who's not identified in the reports, but if the government knows or can find out who that person is, that person's information seems to be, again, helpful to the defense; and as with the other *Mahaffy* witnesses, that person should be identified sooner or later. If there is some reason why being too specific could endanger someone, the government can give a list of people who were at the party who the defense may want to speak to, and they don't have to specify why; but if it's known to the government who CI-1 got the information from, that information is helpful, and the defense should get it.

Next, defendant wants the 3500 material 30 days ahead of time. I don't have the authority to order it, but I am sure the government doesn't want to have lengthy adjournments for defense counsel to review it. If we have the situation that led to the problems in my other case, for example, that 3500 for a

witness includes a large amount of prison calls, you've got to turn it over far enough in advance for defense counsel to review it, even if that's months ahead.

Regular 3500, by which I mean interview notes, corroboration agreements, plea minutes, all that stuff, I think I have already set a date for seven days ahead. However, if it's a witness about whom the government has no safety concerns, or if it's already known to the defense that the person is going to be a witness because of something that's already been turned over, the government should make it two weeks ahead, given the volume. Otherwise, one week suffices in a case like this with danger always a possibility and a trial that will go on for three to four weeks, and not just a theoretical possibility, I might add.

And when the government turns over the 3500, it should advise defense counsel as to who it plans to call in the first week so that the defendants know on whom to focus, and each night during the trial -- I am sure the government will do this anyway -- but they should give the defense counsel an idea of who they are planning to call the next day, and I understand sometimes things go sideways, and you need to call people out of order, but give the defense your best guess each evening as to who is coming next.

Finally, the defendant is asking for the identification of confidential witnesses or confidential

informants or their production in court so that defense counsel can ask in person if they will submit to an interview. The leading Supreme Court case on disclosure of informants is *Roviaro*, 353 U.S. 53. It says that, Where the disclosure of an informant's identity or the contents of his communication is relevant and helpful to the defense or essential to the fair trial, the informant's privilege must give way." That's 353 U.S. 60 to 61. It went on to say at page 62 that there is no fixed rule with respect to disclosure. What's required is balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether or not disclosure is reversible depends on the circumstances of the case taking into account the crime charged, the possible defenses, the significance of the informer's testimony and other relevant factors. That's *Rovario* at 62. See *Rugendorf v. U.S.*, 376 U.S. 528 at 534 to 35. *U.S. against Lilla*, 699 F.2d 99 at 105, and *U.S. against Ortega*, 471 F.2d 1350 at 1359.

The defendant is generally able to establish a right to disclosure where the informant is a key witness or participant in the crime charged; someone whose testimony would be significant in determining guilt or innocence, but disclosure of the identity or address of a confidential informant is not required unless the informant's testimony is shown to be material to the defense. The testimony that could merely have

cast doubt of the general credibility of one of the government witnesses is normally insufficient to overcome the informant's privilege. *U.S. against Saa*, 859 F.2d 1067 at 1073 to 74.

The only CI or CW that I know of is CI-1, who I have discussed above, who doesn't know anything personally. I don't know if there were CI buys in this case. For example, nobody's given me any information about them, but I assume if there were, the recordings and the lab reports, et cetera, have been turned over. Defendants haven't identified any such person or made the showing that there is an informant who is a key witness or participant whose testimony would be significant. So without more information, I can't evaluate the motion.

Is there someone or something that the defendant had in mind?

MR. BACHRACH: For CIs? No. For CWs, there are several people we suspect but have not been confirmed yet, and I don't think I should.

THE COURT: Well, if these are people who are going to testify, you know, if your definition of CW includes cooperators, I don't know of any basis why they need to be identified this far out. If they have -- if you want to ask for an interview, customarily, that gets passed to the lawyer for the cooperator; and that cooperator will be identified in the 3500. I don't fault you for wanting to cross your T's and dot your I's by asking for an interview, but I think we all know

that's an exercise, a formality. So at this point, I don't think there is anything for me to order in that regard.

That's all I had. I mean, that's enough. I'm not asking for more, but is there anything else we should talk about today?

MR. PARKER: May we have a moment to confer, please?

THE COURT: Yes.

(Pause)

MR. BACHRACH: Your Honor -- actually, one more moment. Sorry.

(Pause)

MR. BACHRACH: Couple of things that we may just go back very briefly to the Brady motion? If Your Honor prefers a written motion for reconsideration, I figured you wouldn't, that's why I figured we might as well just take care of it now. A couple of things, and this might need a clarification because Mr. Parker and I heard different things. So we might just need to clarify what it was that Your Honor stated.

THE COURT: Okay.

MR. BACHRACH: With respect to the list of individuals that you suggested that the government turn over, did you say a list of every individual at the party that they spoke to?

THE COURT: No. No. What I was saying is the -- there are a couple of witnesses who don't know anything and who say they were told by someone, X, Y or Z. It's not clear to me

the government knows who the someone is; but if the government knows who the someone is, and there is a reason why they don't want to say the someone who spoke to Witness 11 is John Smith because that will put John -- that will put Witness 11 or John Smith in danger, if they want to just give you a list of people you might want to talk to without saying John Smith is the one who gave CW his information, they can do it that way.

MS. COMEY: If I may just clarify, Your Honor, that is just on the premise that we actually know who these particular witnesses were getting their information from. To the extent we don't know the names, obviously, there is nothing for us to disclose.

THE COURT: Correct. And I know sometimes the government says, well, you know, Witness 1 heard this from someone, but if we identify who Witness 1 heard it from, it will identify Witness 1, and that puts Witness 1 in danger. So we are not -- we don't want to identify Witness 1, and -- but if what Witness 1 -- if they know who Witness 1 is -- excuse me -- if they know who Witness 1 heard it from, and it's Brady, they've got to turn it over. In which event, if they want to -- I don't want to use the word "bury it," but if they want to surround it with some other names so as to make it less obvious who spoke to whom while still giving the defense the information it needs, which is who is the person with the facts, it can do it that way; but yes, that's only if the government is in a

position to provide that information.

MR. BACHRACH: Okay. So that brings me to the other point I wanted to make. This is, I guess, with respect to Witnesses 8, 9, 10, 11, 12 and 13. The witnesses who were not present who heard -- who heard information that constitutes -- sorry -- not Witness 10, take out 10 -- the ones who heard information that could constitute Brady. Now, Your Honor suggested --

THE COURT: That's what I am talking about.

MR. BACHRACH: Right. But Your Honor is suggesting if they know who the person is. If they don't know who the person is, then the only way for us to inquire who those people are would be to inquire of the witness who made the comment to them that we heard someone else did it; and those witnesses might be more amenable to speaking to us than to the government as far as providing who that information was from. So our only way of investigating that subset of those witnesses, the ones the government can't give us the information from, because they don't have it, is for us to be able to speak with them ourselves. That is, the ones identified by number here. And I know the real -- the government's objections to that has been security concerns. While that may be true for some defendants, I really -- I think the government would have to make a specific, detailed explanation as to why it's required here because Mr. Young is out on bail. He is out on bail after a

specific determination that he was not a risk of danger, and he's been out on bail for eight months. If he was a security risk, we would know by now.

THE COURT: Well, first of all, that was over the government's objection you will recall.

MR. BACHRACH: Yes.

THE COURT: I didn't find by clear and convincing evidence that your client personally was a danger, but let's not be naive. There are -- he is not going to go out and do anything, but there is an enterprise we are talking about here, a very violent one allegedly. But I think the answer is simpler. They can't turn over what they don't have.

MR. BACHRACH: But they have the names of the individuals who provided them with a lead, at least, or were providing us with a lead that there is Brady information out that these people heard from someone else, and you are right. You are right. I am not trying to be naive, Your Honor, but I have offered in my papers to accept that those names, subject to protective order, that limits the information solely to counsel and to counsel's investigator and not even to the defendant.

Now, I don't think, Your Honor -- I don't think anyone would ever accuse counsel or an investigator of being part of this enterprise.

THE COURT: That's true.

MR. BACHRACH: So there should be no security concerns

under those situations, and since that that is the only way -- it sounds like that is the only way with respect to at least some of these witnesses, we are even going to be able to investigate who told them that someone else -- who told that person that someone else was the shooter, I think under those -- under that situation, at least subject to protective order, we should be entitled to it.

THE COURT: I am thinking out loud here, and what I am thinking is, these witnesses who have arguably something helpful to say, I mean, they are inculpatory in that they may have identified your client as a shooter, but they are exculpatory -- I don't mean these witnesses, these witnesses' sources of information -- but they are exculpatory in that they say that "G" shot first, for example. They may have more to worry about from the rival side of things. In other words, you know, it's -- it's not simply, oh, Mr. Young is not a danger. If there is a witness who said, I saw "G" shoot, "G"'s buddies could be a danger to that witness. So there is I think a real concern.

On the other hand, as I have said, Brady doesn't say the government's obligation disappears if there is a safety concern. So let me hear from the government why the proposal to make it for attorneys' and investigators' eyes only would not suffice.

MS. NICHOLS: Thank you, Your Honor.

First of all, you know, the information that we have disclosed we think does give defense counsel a good amount of information to work with.

THE COURT: Well, Mr. Bachrach is right in that --

MS. NICHOLS: We are not disagreeing, Judge.

THE COURT: If you say there is a guy who heard from a guy something helpful, they are never going to get to the second guy without knowing who the first guy is.

MS. NICHOLS: We are not disagreeing, Your Honor. I think that everyone in this case wants the same thing: We want a fair trial and we want a safe trial, and it's just a balance of those two concerns.

So what we have done in the first instance is ten months before trial we provided this information about these alternate perpetrators that were the subject of these rumors that individuals heard on the streets. That allows defense counsel to work on those alternate perpetrator theories trying to chase down some of the content of the information; and then as to the source of the information, we understand Mr. Bachrach's position, and we do contemplate that as to, I believe it's Witness 12 -- 11, 12 and 13, that we would be turning over attorneys' eyes only to Mr. Bachrach the names of those people, and we were thinking about a month before trial. We think that that would be a sufficient amount of time for counsel to chase down that information, to see if those people

will be interested in speaking with defense investigators, and to follow up as needed.

Your Honor, I do want to say that the safety concerns here are not limited to Mr. Young himself. I mean, the government does have safety concerns about Mr. Young being out on bail and living with his brother, who is an uncharged member of the Southside Gang. However --

MR. BACHRACH: Excuse me. He is not living with his brother. He is not -- he is actually precluded from contacting him, having communications with his brother.

MS. NICHOLS: Okay. That being said, Your Honor, there are a number of people in Southside who are not charged, and but the point that I was trying to make is that this is bigger than any particular gang member here. We know from this very case and from other Newburgh cases that in Newburgh there is a culture of retribution towards people who speak to law enforcement, and so the government does have a concern that, notwithstanding that Witness 11 is only able to say that he or she heard a rumor, that the fact that Witness 11 voluntarily spoke to the police is going to subject Witness 11, and possibly his or her family, to threats or worse from people who are completely unrelated to the case; and the Facebook messages that Your Honor has seen in this case have shown that that is true. There have been Facebook threats and comments from people who are not charged and not really factually connected to the crimes

charged in the Indictment here.

So those are the safety concerns that the government is anticipating, and we believe that the disclosures that we have already made and the ones that we anticipate making closer to trial will adequately balance those concerns.

THE COURT: Well, I don't really quarrel with what you've said.

I mean, Mr. Bachrach, if you think that there are others who fall into the same category as 11 through 13 that you should also get, you should talk to the government and come back to me if you have unresolved differences; and maybe you can twist their arms and get it a little sooner than a month, but I do think, as I have said, not only is there alleged to be a very violent group of people involved in this case, but --

(Phone interruption)

THE COURT: There's got to be a way to turn it off.

I have already seen in this case evidence of the culture that the government describes, and as I said, even if these people are helpful to Mr. Bachrach's client, the deceased had a crew; and if they share that culture, or at least it seems like he did, that person could have worries from that side as well. So it's a serious concern.

I don't minimize it, and obviously, the government should do whatever it can to assist these people because their names are going to become, not public, but known to at least the

lawyers and, you know, it would be a real shame if that made people even more reluctant to speak to the police than they already are.

However, my job is to make sure the defendants get a fair trial, and that's the government's job, too, and seems to me, a month before and for counsel and counsel's investigators' eyes only and only -- it seems to me there won't -- if what happens is these people who don't know anything themselves point counsel or an investigator to a third person who does, there is really no need for these names ever to come out.

If there is -- if an attorney gets something for his or her eyes only and believes that there now is a reason, we will talk about that and do whatever is necessary to make sure that the defendants here get a fair trial and to hope nobody else is endangered beyond what we have already seen.

Okay. Did that cover what you were concerned about?

MR. BACHRACH: Yes, Your Honor. Thank you.

THE COURT: All right. We don't have our next get-together for a while. We've got --

MR. TULMAN: Your Honor, if I may, just to be clear, I had joined in the motion by Mr. Bachrach and Mr. Parker, so I would trust that to the extent disclosures be made available, because these counts really do pertain to my client as well.

THE COURT: This is the Valentine's Day party?

MR. TULMAN: This is the Valentine's Day, yes. So it

would be applicable to me as well, and that's acknowledged by the government.

MS. NICHOLS: Yes, Your Honor.

MR. TULMAN: And the other thing, Your Honor, in terms of just not 3500 material or Brady, but just discovery, just a general inquiry of the government whether there is additional discovery that has not yet been produced in this case.

THE COURT: Well, you know how they are. They are going to be subpoenaing things up until closing argument.

MR. TULMAN: I understand that. I mean, I note, for example, Your Honor --

THE COURT: They are not sitting on anything, that's what you want to make sure.

You guys aren't sitting on anything, are you?

MS. NICHOLS: No, Your Honor. The only issue that we need to discuss with defense counsel, and I don't know that we need to do it before Your Honor, is the phones have been produced to the defendants as individual discovery; and so we need to have an understanding from defense counsel as to whether they would prefer that we would cross-produce them to everyone involved under the protective order, which I think is the most expedient way to do it and could be done basically now, or whether they want us to separate out the Rule 16 from the nonresponsive personal material, which would take some time.

Again, I don't know that the Court needs to weigh in

on that question, but that is the outstanding --

THE COURT: You can chat about it.

MS. NICHOLS: -- nature of the Rule 16.

MR. TULMAN: I was -- in my mind, I was thinking of Shablacky's medical records is one thing on my list that we have never received, and I would presume that by this point the government would have in their possession those medical records.

THE COURT: Well, you need to ask them.

MR. TULMAN: Right.

THE COURT: And, you know, I am presuming that the only things they are holding back are things that are safety related or, you know, there is a logistical issue. They are not going to sit on Rule 16 material for no reason. Maybe they haven't gotten Shablacky's records, but they will now or maybe you can ask for it.

So we are going to have motions in limine.

MR. MIEDEL: Your Honor, I am sorry. There is the remaining issue of pretrial motions for Mr. Hawkins.

THE COURT: Yes. Yes. We need to set a schedule for those, and you had proposed something and that looked all right to me. Let me just find that letter.

Mr. Davis and Mr. Hawkins will make their motions March 18th. Opposition April 1. Reply April 15th. Let's see if we can find a day in May for me to give you rulings on those motions.

Oh, and we also need to set a date for the hearing on Mr. Young's postarrest statements. Do we have something like right after Memorial Day?

MS. SHELLOW: Excuse me, Your Honor. I am in trial before Judge Donnelly in the Eastern District starting on the 28th of May, which I believe is that first Tuesday after Memorial Day.

THE COURT: All right. Then let's get the week before. I have a trial May 6th that's going to be two to three weeks, but let's live dangerously. Let's say May 24th. That should be pretty clear, right? All right. May 24th at 9:30 for rulings on the motions.

Hearing on Mr. Young's postarrest statements, my March has kind of opened up because I had to adjourn that other case. What have we got on March 7th? I am just picking a random day.

MS. NICHOLS: March 7th, Your Honor? That's fine.

THE COURT: I am not sure if He Who Must Be Obeyed has approved it. Find us a date, find us a half a day around there.

MR. BACHRACH: Your Honor, that entire week I will be in El Salvador on an MS-13 case.

THE COURT: Oh, okay.

MR. BACHRACH: And I will be out a lot of the following week as well.

THE COURT: We could do it -- no. Mr. Bachrach can't do it. So that would be either the end of this month or the

week of March 18th. What do we have like March 21st or 22nd?

THE DEPUTY CLERK: March 22nd is good, 10:00 a.m.

THE COURT: March 22nd. Let's make it 9:30 just in case. March 22nd, 9:30 for the suppression hearing.

Give the -- give Mr. Bachrach the 3500 on March 18th. I am not sure there will very much, but -- okay. And we've got motions in limine due May 24th and opposition June 3rd.

Enterprise letter, is that going to come with the motions in limine?

MS. NICHOLS: If not before, Your Honor.

THE COURT: Let's do it a week before.

MS. NICHOLS: Okay.

THE COURT: Enterprise letter May 17th, and we've got our final pretrial conference June 24th.

MS. SHELLOW: Your Honor, replies to the motions in limine on the 10th?

THE COURT: I don't really want replies.

MS. SHELLOW: Okay.

MR. BACHRACH: I'm sorry, Your Honor. I didn't hear the enterprise letter date?

THE COURT: May 17th. And the parties should talk either as to whether the government is moving to admit all of that or the defendants are moving to preclude it, but there is no reason why both should do it.

MS. NICHOLS: I am sorry, Your Honor. I think we

missed that on our end.

THE COURT: I am saying with the stuff in the enterprise letter, either the government should make a motion to admit it or the defense should make a motion to preclude it, but not both.

MS. NICHOLS: Yes, Your Honor.

THE COURT: So you guys can figure out how you want to do it.

MR. PARKER: Did you set a time for June 24th, Your Honor?

THE COURT: I think we previously had set it for 10:00 a.m. If you are going to turn it over ahead of time, they can make a motion to preclude or you can make a motion to move it in. I don't care.

And proposed jury instructions and voir dire questions are also due June 3rd, and we will pick the jury July 8th as scheduled and hope we won't run into too many problems with vacations and stuff like that.

All right. Anything else we should do now?

MS. NICHOLS: Nothing from the government, Your Honor.

MS. SHELLOW: Nothing from Mr. Davis.

MR. TULMAN: Nothing from us, Your Honor.

MR. BACHRACH: Thank you, Your Honor.

THE COURT: All right.

(Time noted: 12:45 p.m.)